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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JULIO M. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOSE M. et al.,

Defendants and Appellants.

D052823

(Super. Ct. No. SJ11883A-B)

APPEALS from orders of the Superior Court of San Diego County, Elva R. Soper,
Judge. (Retired Judge of the Los Angeles Sup. Ct. assigned by the Chief Justice pursuant
to art. VI, § 6 of the Cal. Const.) Affirmed.

Jose M. (Father)¹ appeals orders declaring his minor children, Julio M. and Josie M. (the minors), dependents of the juvenile court under Welfare and Institutions Code² section 300, subdivisions (b) and (j), and removing them from his custody under section 361, subdivision (c)(1). Father challenges the sufficiency of the evidence to support the court's jurisdictional and dispositional findings. Denise M., the minors' mother, argues the court erred by not considering disposition alternatives less drastic than removal. Father joins in Denise's argument. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

On October 2, 2007, the San Diego County Health and Human Services Agency (Agency) filed petitions in juvenile court on behalf of two-year-old Julio and eight-month-old Josie under section 300, subdivisions (b) and (j). The petitions alleged the minors' parents, Denise and Father, exposed the minors to violent confrontations in the home. Specifically, Denise held a knife to Father's throat. The petitions further alleged the minors were at risk of harm because of abuse suffered by their half sibling, seven-year-old Jose. Jose disclosed to social workers that he had been sexually abused by his mother's boyfriend, Michael H.³ Father and Denise had knowledge of the abuse yet

¹ We refer to Jose M. as Father in this appeal in order to avoid confusion with Jose M., Jr., a minor that is not subject to this appeal but referenced in this opinion.

² Statutory references are to the Welfare and Institutions Code.

³ Michael H. is referred to by the parties in their briefs as "Grumpy."

allowed Michael to be in the family home in the presence of the minors. Further, Father failed to adequately supervise Jose when he gave Jose beer and marijuana.

According to the detention report, Father had an extensive history with child protective services. Father received reunification services from August 2002 through December 2004 after physically abusing Jose. Father successfully reunified with Jose and regained custody. From 1996 to 1998, Father had an open dependency matter involving his two older daughters. Father had physically abused one daughter when he twisted her leg, which resulted in a fracture. He forced his other daughter to stay in a bed or chair all day and withheld food for long periods of time. Father was convicted of felony child abuse and sentenced to prison for four years. Father lost visitation rights to those children.

Social worker Ranila Allen reported she met with the minors' half sibling Jose. Jose stated he lived with his paternal grandmother. Jose explained that his mother Audrey does not visit him at his grandmother's house because his grandmother does not allow Audrey or her boyfriend Michael in the home. Jose stated Michael had "put his penis in my mouth when mommy was sleeping" and afterwards Michael made him "spit the germs into a water bottle."

The paternal grandmother explained to the social worker that Jose had been living with Audrey and Michael in her home when the abuse occurred. She revealed Father and Denise were aware of the abuse but did not report the incident to the police. The paternal grandmother has not allowed Michael or Audrey into her home since Jose disclosed the abuse to her. However, the grandmother stated Michael and Audrey have visited and

spent the night at Father's home while the minors were present in spite of the fact Father was aware of Jose's abuse.

The grandmother also reported Father and Denise smoke marijuana in their home and permitted Jose to smoke and drink beer. Father would bring Jose to her home "high" and smelling of marijuana. Allen questioned Jose about these incidents and he confirmed that Father gave him beer and marijuana. Allen visited Father to confirm whether or not he knew Michael abused Jose. Father confirmed he was aware Jose had been abused by Michael but denied permitting Michael to come into the home. He further denied giving Jose beer and marijuana.

The detention report also noted Josie had a black eye and a bruise on her forehead. The grandmother told Allen that Denise had been applying cream to Josie's eye in hopes the bruise would disappear before Allen saw it. Denise stated the bruise was a result of Julio hitting Josie with his bottle. The grandmother believed Denise hit Josie because Denise had a temper and suffered from violent outbursts.

The social worker reported that the Agency offered Father and Denise voluntary services and was prepared to offer referrals for parenting classes, drug testing and counseling. At the detention hearing, the court reviewed the detention report, made a true finding on the petitions as to both minors, and detained them in a foster home. The court ordered reunification services to the parents.

In the October 2007 jurisdiction report, Allen reported the parents began voluntary services and had received referrals for therapy and parenting classes. However, the parents continued to deny the allegations against them. The report noted the minors were

at home at the time of the domestic violence incident although the minors did not witness the violence. Following the physical altercation, Denise was taken to a mental health facility where she tested positive for methamphetamines. Allen learned Father was on probation and, during a random drug test in September 2007, he also tested positive for methamphetamines.

Allen concluded several factors indicated the minors were at risk of harm. Jose and the paternal grandmother both reported Father had provided beer and drugs to Jose. Father further showed his inability to protect the minors when he allowed Michael to come into the house while the minors were present. Father also had an extensive criminal history, a history with child protective services, and a conviction for felony child abuse. Both Father and Denise struggled with issues of domestic violence and both had positive drug tests around the time the minors were taken into custody. The paternal grandmother reported Denise has a temper and, in addition to the incident of domestic violence, Denise would use a knife to scratch the walls of her home when angry. Allen recommended the court declare the minors dependents, remove them from parental custody, and order the parents to participate in services to address the protective issues.

The court held a contested jurisdiction and disposition hearing in March 2008. The court received in evidence the Agency's reports and Father's initial treatment plan completed by a therapist in mid-December 2007. The therapist acknowledged Father was actively participating in therapy and had attended all his appointments. However, Father continued to deny giving Jose alcohol and cigarettes/marijuana. He claimed he had not smoked marijuana for a year, but admitted to using methamphetamines. He did not

report Jose's sexual abuse to the police because he was afraid of gang retaliation. The therapist reported concern about Father not taking full responsibility to protect his children but noted his motivation to reunify with them.

The court heard testimony from several witnesses, including Jose, Father, and the paternal grandmother. Jose gave details surrounding the sexual abuse he suffered. He was living with his mother and Michael in his grandmother's garage at the time of the abuse. Jose stated Michael put his penis in Jose's mouth. Jose told Father about the abuse and Father became very angry with Michael. Jose further testified he saw Denise become angry at Father and saw her stick a big knife at Father's neck.

Concerning his exposure to beer and marijuana, Jose testified Father offered him a beer. Jose drank the beer and said he did not feel very good afterwards. He claimed he had been given beer about three times and would drink the entire can. He further claimed Father gave him marijuana and that he smoked the drug about two times. Denise was in the room at the time he smoked marijuana. In addition to marijuana, Father also gave Jose cigarettes.

The grandmother testified Jose disclosed to her the abuse he suffered at the hands of Michael. The grandmother spoke to Father about the abuse and he stated he knew about the abuse. She claimed she saw Michael at Father's home twice after her discussion with Father. On one occasion, Josie and Julio were in the same room as Michael. The second time, the minors were in a bedroom. The grandmother also saw Michael another time at the next door neighbor's apartment.

Concerning marijuana abuse, the grandmother testified she visited Father's home and many times she could smell marijuana and was not able to see the room clearly because of all the haze from the smoke. The minors were at home during her visits. She also stated Jose told her that Father would allow him to smoke and drink in the house. Denise was present at the time, and she did not try to prevent Jose from handling these substances.

Father testified that Jose had told him about the sexual abuse and that Denise was also aware of the abuse. He stated he confronted Michael about the abuse and denied that Michael ever returned to the home.

After hearing testimony and reviewing the Agency's reports, the court sustained the allegations of the petitions, declared the minors dependents, and removed both minors from Father's and Denise's custody. The court ordered the minors placed in foster care and granted the parents supervised visitation.

DISCUSSION

I

Father Challenges the Court's Jurisdictional Findings

Father challenges the sufficiency of the evidence to support the court's jurisdictional findings under section 300, subdivisions (b) and (j). He asserts: (1) the court's finding of jurisdiction under section 300, subdivision (b) should be reversed because a single incident of domestic violence is insufficient to establish substantial risk of harm; and (2) the evidence of Jose's sexual abuse and Jose being supplied with beer

and marijuana was insufficient to support a finding the minors were at substantial risk of harm under section 300, subdivision (j).

A

Standard of Review

In reviewing the sufficiency of the evidence on appeal, we look to the entire record to determine whether there is substantial evidence to support the findings of the juvenile court. We do not pass judgment on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court's order, and affirm the order even if there is other evidence that would support a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) When the trial court makes findings by the elevated standard of clear and convincing evidence, the substantial evidence test remains the standard of review on appeal. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) The appellant has the burden of showing that there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

B

*Substantial Evidence Supports the Court's
Section 300, subdivision (b) Jurisdictional Findings*

Father challenges the sufficiency of the evidence to support the court's jurisdictional findings under section 300, subdivision (b). He asserts: (1) a single

incident of domestic violence was insufficient to support a finding the minors were at risk of substantial harm; and (2) the evidence surrounding Jose's sexual abuse was insufficient to support a finding the minors were at risk because Michael was not a threat to the minors.

Section 300, subdivision (b) provides a basis for juvenile court jurisdiction if the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of the parent's failure to adequately supervise or protect the child or to provide adequate medical treatment. In enacting section 300, the Legislature intended to protect children who are currently being abused or neglected, "and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194-196.)

Concerning the allegations of domestic violence, admittedly there is only one documented incident of domestic violence in the home and Father argues the minors did not witness the event.⁴ However, domestic violence in the household where children are living constitutes neglect in that it is a failure to protect the children from the substantial risk of encountering the violence and suffering serious physical harm from it. "Such neglect *causes* the risk." (*In re Heather A.*, *supra*, 52 Cal.App.4th at p. 194 [children do not have to be physically present in the same room as the violence to be considered at

⁴ Jose testified he witnessed the domestic violence.

risk]; see also *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169 [substantial evidence supported jurisdictional finding children were at substantial risk of serious harm due to violent confrontations in family home]; *In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5 [common sense and expert opinion indicate domestic violence is detrimental to children].) Here, the nature of the incident coupled with Denise's temper and Father's history of violence is sufficient evidence for the court to find violence may continue in the future. Denise admitted to having a physical altercation with Father during which she grabbed a knife and held it to Father's throat. She further admitted to becoming angry and scraping the kitchen sink with a towel bar. The minors' paternal grandmother reported Denise had a temper and violent outbursts. In addition to Denise's anger problems, the Agency reported Father had a long history of arrests for violent behavior, a history with child protective services, and a conviction for felony child abuse. Given his propensity toward violence coupled with Denise's anger problems, the parents' behavior placed the minors at risk of harm.

Father also asserts the evidence surrounding Jose's sexual abuse was insufficient to support a finding the minors were at substantial risk of harm. He argues the court found jurisdiction because he had allowed Michael into the family home after Michael abused Jose. Father maintains he did not allow Michael into the home after he learned of the abuse and, further, Michael was incarcerated before the jurisdiction and disposition hearing and could no longer pose a risk to the minors. However, the record shows the grandmother saw Michael in the family home at least two times after Jose's abuse. The minors were in the home in both instances. Even if Michael was now in jail, because

Father did not report the abuse to the police and instead allowed a perpetrator into the home, it was reasonable for the court to infer that Father would allow other harmful persons into the home, thereby placing the minors at risk of harm because of his failure to adequately supervise and protect them. Substantial evidence supports the court's jurisdictional finding under section 300, subdivision (b).

C

Substantial Evidence Supports the Court's Section 300, subdivision (j) Jurisdictional Finding

Father also argues there was insufficient evidence to support the court's jurisdictional finding for the minors under section 300, subdivision (j). Section 300, subdivision (j) provides that a child is within the juvenile court's jurisdiction if "[t]he child's sibling has been abused or neglected, as defined in subdivision[s] (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." The court shall consider "circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling . . . and any other factors the court considers probative in determining whether there is a substantial risk to the child." (§ 300, subd. (j).)

The minors remain at risk of serious harm because Father provided Jose with alcohol to drink and marijuana to smoke. Father's neglect of Jose highlights his inability to understand the danger drugs and alcohol pose to children and, thus, he does not have the ability to adequately supervise the minors. Jose testified that Father gave him beer to drink on more than one occasion. Jose described the differences between marijuana

joints and cigarettes and explained he had smoked both of them. The grandmother testified Jose told her Father had given him beer. She had been to the home and could not see because of the smoke and could smell marijuana. Father denies he gave Jose drugs and alcohol and makes strong attempts to discredit Jose's credibility. However, Jose's testimony and the grandmother's testimony provide sufficient evidence to support the court's jurisdictional findings. In any event, this court does not have the "power to judge the effect or value of the evidence. . . . Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.)

In addition, both Father and Denise allowed Michael to visit the home on at least two separate occasions. The parents knew Michael sexually abused Jose but still permitted Michael in the home, thereby placing the minors at risk of sexual abuse. The minors here are both under three years of age and would be unable to protect themselves from a perpetrator or exposure to drugs and alcohol. (See *In re Rocco M.* (1991) 1 Cal.App.4th 814.) Substantial evidence supports the jurisdictional finding under section 300, subdivision (j).

II

Father's Challenge to the Court's Dispositional Findings

Father contends the evidence was insufficient to justify removing the minors from his custody. Specifically, he asserts the facts did not warrant removing the minors from his custody and by the time of the disposition hearing, the protective issues in the case

had been resolved. Denise argues the minors' removal was unnecessary because there were less drastic alternatives available to the court.

A

Substantial Evidence Supports the Removal Order

Before the court may order a child physically removed from his or her parent, it must find, by clear and convincing evidence, that the child would be at substantial risk of harm if returned home and that there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B. G.* (1974) 11 Cal.3d 679, 699.) In this regard, the court may consider the parent's past conduct as well as present circumstances. (*In re S. O.* (2002) 103 Cal.App.4th 453, 461.)

As discussed previously with respect to the court's jurisdictional findings, substantial evidence supports the court's findings that the domestic violence, sexual abuse of Jose, and offering beer and marijuana to Jose placed the minors at substantial risk of harm. Father and Denise engaged in domestic violence in the home and Denise put a knife to Father's neck. Further, although only one incident of violence was reported, there was evidence showing Father has a violent past and Denise has problems

controlling her anger. In addition to the violence, the minors were at risk in Father's care because Father did not acknowledge that drugs and alcohol posed an immediate threat to the minors' overall health and well-being. Father and Denise used marijuana in the home in the presence of the minors, they both tested positive for drug use around the time of the domestic violence incident and Father offered alcohol and cigarettes/marijuana to Jose. Moreover, the parents did not accept responsibility for providing Jose with drugs and alcohol or for allowing Michael into the home even after they knew he had abused Jose. Instead, Father stated he did not report the abuse to authorities because he feared retaliation from his gang. Based on these factors, the social workers believed the minors were not safe and remained at risk until the parents participated in additional services, including therapy, parenting classes, drug therapy, and psychological evaluations. The court was entitled to find the social worker's opinion credible and give great weight to her assessment. We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.) The court's decision to remove the minors under these circumstances is consistent with the purpose of section 361, subdivision (c)(1), which is to prevent harm to children.

B

Less Restrictive Alternatives

Denise contends the court erred by not considering disposition alternatives less drastic than removal. She asserts the minors could have safely remained with her under stringent conditions of supervision. Father joins in Denise's argument.

Before the court removes a child from parental custody, it must find there are no reasonable means by which the child's physical health can be protected without removal. (§ 361, subd. (c)(1).) Although the court must consider alternatives to removal, it has broad discretion in making a dispositional order. (*Ibid.*)

The parents' argument fails because substantial evidence shows that the Agency made reasonable efforts to prevent the need for the minors' removal, but that such measures were not sufficient in the end to protect the minors. The Agency offered voluntary services to the parents before removing the minors. These services, however, have not been successful in addressing the many issues surrounding this dependency and the minors remain at substantial risk of harm. A report from one of his therapists expressed that Father had yet to take full responsibility to protect his children. At the disposition hearing, Father continued to deny offering Jose drugs or alcohol. He further denied allowing Michael into the home.

Concerning Denise, we acknowledge she admitted attacking Father with a knife and that the two of them were addressing their relationship issues in therapy. However, they had yet to complete their therapy sessions and parenting classes. Denise admitted she knew about Jose's abuse and she was also aware that Father gave Jose alcohol and drugs. Denise did nothing to protect Jose and thought Jose was lying about the sexual abuse. Given Father's ongoing denial and both parent's inability to protect the minors, placing the minors with the parents under stringent conditions was not a viable option. (See §§ 360, subd. (b), 361, subd. (a).) Under these circumstances, the evidence supports a finding no reasonable means to protect the minors were available without removing

them from Father's and Denise's custody. (See *In re B.G.*, *supra*, 11 Cal.3d at pp. 698-699.)

DISPOSITION

The orders are affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.